

**BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND**

TARIQ SYED

Complainant

v.

**GATESTONE HOMEOWNERS
ASSOCIATION, INC.**

Respondent

Case No. 46-09
July 30, 2010

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County, Maryland (the Commission) for hearing on May 19, 2010, pursuant to Chapter 10B of the Montgomery County Code (MC Code). The Hearing Panel (Panel), having considered the testimony and evidence of record, finds, concludes and orders as follows.

I. Background

Complainant Tariq Syed (Complainant or Mr. Syed) filed a complaint with the Commission against Gatestone Homeowners Association, Inc. (Respondent or the Association), to overturn a decision of the Association's Board of Directors (Board) relating to an application Mr. Syed had filed with the Association. The application sought permission to construct an above-ground deck at the rear of his town home. The deck surface itself complied with the Association's architectural guidelines and was approved. However, the deck's railings were to be made of a white vinyl material, which the Board disapproved, saying the railings must be constructed of pressure-treated wood or a synthetic neutral wood color.

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Mr. Syed's application also requested permission to install a white vinyl privacy screen. The Board initially rejected that request but, after reconsideration, authorized the screen so long as it was of a neutral wood color and of appropriate dimensions.

The Board informed Mr. Syed of his right to file a complaint with the Commission and he did so on August 6, 2009.

Commission Exhibit 1 (CX1) was admitted in evidence without objection at the start of the hearing. CX1 is the Commission staff's file in this case, consisting of the pleadings and attached exhibits, and miscellaneous correspondence and notices.

Mr. Syed testified on his own behalf. He also called Catherine Maybury, a member of Respondent's Board, and he offered in evidence without objection Complainant's Exhibit (Cmplt. Ex.) 1, consisting of a series of emails among Board members, a list of expenses incurred in preparing his case, and a dictionary definition of "deck."

The Association called Catherine Maybury, Russell Henson (a Board member), Pat Hackley (an employee of Respondent's current property manager, ProCam), and Lisa Evans (a Board member and the Association's Vice President). Respondent also introduced without objection the following exhibits:

- Respondent's Exhibit (Rspt. Ex.) 1 – selected photographs showing various homes and common areas in the community.
- Rspt. Ex. 2 – a site plan of the community.
- Rspt. Ex. 3 – minutes of a Board meeting on January 13, 2004.
- Rspt. Ex. 4 – minutes of a Board meeting on May 20, 2004.
- Rspt. Ex. 5 – agenda for a Board meeting to be held May 13, 2009.
- Rspt. Ex. 6 – minutes of a board meeting on July 8, 2009.
- Rspt. Ex. 7 – excerpts from materials prepared by the Montgomery County Department of Permitting Services specifying requirements for residential decks.

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- Rspt. Ex. 8 – excerpts from the Association's Declaration of Covenants.
- Rspt. Ex. 9 – excerpts from the Association's Architectural Rules
- Rspt. Ex. 10 – further excerpts from the Association's Declaration of Covenants.

- Rspt. Ex. 11 – Deed dated March 23, 2005 by which Complainant and his wife acquired ownership of their town home.

At the conclusion of the hearing, Respondent waived any claim for attorneys' fees.

II. Findings of Fact

Based on the testimony and exhibits offered in evidence, the Panel makes the following findings of fact:

1. The Association is a homeowners association as defined in Md. Code, Real Prop. § 11B-101 and it is a common ownership community as defined in MC Code § 10B-2(b).

2. The Association consists of 133 town homes, and common areas.

3. Mr. Syed's town home, which he and his wife purchased in March 2005, is a lot within the Association and is subject to the Association's governing documents. Rspt. Ex. 11.

4. Although the Association is located near high-rise and commercial buildings, photographs of homes and common areas within the Association show many trees, wooden fences and wooden decks.

5. The Association's current Board seeks to maintain what could be characterized as a rustic, "woody" appearance for the Association.

6. Original purchasers of units within the Association were given the option of having the developer construct decks which, under the developer's requirements, would be of wood or a wood-like surface.

7. The Association's Declaration of Covenants prohibits any structure, improvement, exterior addition, change or addition until complete plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of the external design and location in relation to surrounding structures and topography by the Board.

Rspt. Ex. 8. The Declaration goes on to authorize adoption of rules and regulations regarding the form and content of plans and specifications to be submitted for approval and may publish such statements of policy, standards, guidelines and/or establish such criteria relative to architectural styles or details, or other matters, as it may consider necessary or appropriate.

Rspt. Ex. 10.

8. The Association's architectural rules (Rspt. Ex. 9), by their terms, are "to promote the community's overall beauty and make it a desirable place to live."

9. The architectural rules require submission of a complete application for all decks and fences. Further, decks and fences "will be constructed of pressure-treated wood, or a synthetic composite material provided the color is a neutral wood color." Such applications "will be reviewed with respect to size, color, design, materials, and location." The normal procedure is to submit an application to the Association's property manager, which then transmits the application to the Board with its (the property manager's) recommendation. See CX1 at 12.

10. While the architectural rules recommend railings for all decks, they do not specifically address the color or materials of railings.

11. The architectural rules require an application for all privacy partitions and require them to be "compatible with the architectural character of the house in terms of style, color, and materials." CX1 at 17.¹

12. Of the 133 units within the Association, approximately 30 have decks. Some were installed by the developer and others were installed after development was completed.

13. Of the approximately 30 town homes with decks, four have white vinyl railings. Two of those also have white privacy screens.

14. According to testimony by Ms. Maybury, a James Walker (who was then on the Association's Board), acting on his own, approved three of the four units with white vinyl railings on their decks, including his own. Mr. Henson testified similarly. The applications for the three decks, as contained in CX1, bear Mr. Walker's signature, purportedly on behalf of the Board. However, there was no further testimony or evidence, such as meeting minutes, to show that the three applications were in fact considered by the Board. The Panel therefore finds that Mr. Walker acted independently in approving the three applications.

15. The fourth unit with white vinyl deck railings was expressly approved by the Board at its March 12, 2008 meeting. CX1 at 20. The resultant approval letter, sent by the new property manager, says that "the approval contained in this letter is affirmation for harmony of the external design and location in relation to surrounding structures and topography by the Board." CX1 at 62.

¹ The parties used "privacy screen" and "privacy partition" interchangeably. The Panel will do the same.

16. According to testimony by Ms. Maybury and Mr. Henson, the reason the Board gave its approval on March 12, 2008 was because the Association's prior property manager failed to act on the owner's application within the required 60 days, as a result of which the application was deemed approved.² By the time the Board became aware of the application, the construction was completed and the Board felt it had no choice but to approve the application.³

17. On cross-examination, the Board witnesses acknowledged that they have taken no action with respect to the four non-conforming decks, such as including a notice of violation in resale packages, or adopting a rule requiring any repairs or replacements to be conforming. The witnesses explained, however, that the reason for inaction was that the Board was awaiting the result in this case, and the Panel so finds.

18. But for the four units with white vinyl deck railings, the Board has consistently required wood or wood-like materials in decks and railings. See, e.g., Rspt. Ex. 3, 6. Ms. Evans testified that when she sought to build a deck in 2005 she was told that it had to be of wood.

19. On April 8, 2009, Mr. Syed submitted a written application to construct a deck of pressure-treated wood, with white vinyl railings and a white vinyl privacy screen. CX1 at 24. At the time, Mr. and Mrs. Syed were expecting their first child and they were anxious to have the construction work completed before the child's birth.

20. The railings described in Mr. Syed's application would have been visible from the street in the Association's common area.

21. The Board attempted to accommodate Mr. Syed by considering his application at the Board's April meeting, but it did not do so because it failed to muster a quorum.

22. By letter dated May 6, 2009, the property manager denied the application, saying "the community does not allow white vinyl as a material for decking nor does it allow privacy lattice." CX1 at 34. It is unclear from the record whether the property manager acted on its own or whether the Board was involved in the decision.

² The current architectural rules say that approval is automatic if no action is taken within 30 days after receipt by the property manager. CX1 at 11. The Declaration says 60 days. CX1 at 89. The discrepancy is not material for purposes of this case.

³ The minutes of that meeting show the vote was unanimous. CX1 at 22. Mr. Henson testified, however, that he voted against approval.

23. Mr. Syed filed a written appeal the next day, arguing against the denial. CX1 at 35. The matter was placed on the Board's agenda for its May 13, 2009 meeting. Rspt. Ex. 5.

24. At the May meeting, in which Mr. Syed participated, the Board approved the privacy screen, "provided it is of a neutral wood color and of appropriate dimensions," but the Board affirmed disapproval of white vinyl railings. CX1 at 40.

25. In subsequent communications, Mr. Syed pointed out to the Board the existence of other white vinyl railings. That engendered email exchanges among Board members, some of which expressed concern that denial of the application might be considered arbitrary given that other decks had white vinyl railings. Some of the emails also evidenced confusion as to the contents of Mr. Syed's application. Cmplt. Ex. 1.

26. Throughout the application process, Mr. Syed received full cooperation from the property manager, who researched old files and provided copies of applications associated with the four units having white vinyl deck railings, all without charge.

27. By letter July 9, 2009, CX1 at 40, the Association confirmed to Mr. Syed its May 3 decision approving the privacy lattice or screen (so long as it met the specified conditions) but disapproving white vinyl railings.

III. Conclusions of Law and Discussion

The Association has decided to preserve a rustic, "woody" appearance for its community. As part of that decision, the Association requires that individual unit owners' decks and fences be constructed of pressure-treated wood, or a synthetic composite material provided the color is a neutral wood color. The Association unquestionably has the authority to make that decision under its governing documents.

Mr. Syed argued that when wood ages, it takes on a weathered appearance which, in his view, is unappealing. He favors vinyl, which does not weather. In contrast, a Board member testified that she finds the weathered look attractive. (Under the Association's rules, Mr. Syed could have had his preferred vinyl railings, so long as they were a neutral wood color.)

The debate – white vs. neutral wood color – is for the Association, not the Commission, to resolve. MC Code § 10B-8(4) (excluding from the definition of "dispute" a "disagreement that only involves . . . the judgment or discretion of a governing body in taking or deciding not to take any legally authorized action"). The Association is constrained, however, to act reasonably. When it interferes with a homeowner's unrestricted use of his or her property, such as by denying applications to make architectural changes, its denials have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be a reasonable

determination made in good faith, and not high-handed, whimsical or captious in manner.

Kirkley v. Seipelt, 128 A.2d 430, 434 (Md. 1957). And, of course, it cannot act arbitrarily, fraudulently, or dishonestly. *Tackney v. U.S. Naval Academy Alumni Ass'n, Inc.*, 971 A.2d 309 (Md. 2009); *NAACP v. Golding*, 679 A.2d 554, 558 (Md. 1996); *Black v. Fox Hills North Community Ass'n, Inc.*, 599 A.2d 1228, 1231 (Md. App. 1992).

In this case, the Complainant made a number of arguments why the Commission should not defer to the Association but should instead reverse the Association's decision and allow white vinyl railings on his deck and a white vinyl privacy screen. Those arguments are considered in turn.

A. Plain Meaning of the Architectural Rules

The architectural rules could be read as making a distinction between decks and railings. Section § 3.7 (CX1 at 14) says, "A railing is recommended for all decks" and that same section requires deck-related applications to "include a drawing that shows dimensions, height above grade and details of railings and stairs."⁴ If the rules do in fact make such a distinction, then it would follow that the requirement for "pressure-treated wood, or a synthetic composite material provided the color is a neutral wood color" literally applies only to decks, not to railings.

Based on this claimed distinction, Complainant argues that since the rules do not prohibit white vinyl railings, he was free to use that color and material for his railings. In contrast, the Association interprets its rules by treating railings as part of a deck and thus applying the wood/wood-color requirement to railings as well as decks.

The Panel concludes that the Association's interpretation of its architectural rules is reasonable, and it will be upheld. The Complainant's interpretation, although plausible, produces an absurd result. The feature that is most visible to the community generally is the railings, not the deck surface, so that enforcing the wood/wood-color requirement as to decks but not railings would not preserve the desired appearance of the community.

Even if the architectural rules are interpreted as silent on the composition and appearance of railings, the Panel concludes that the Association may, in its discretion, impose the wood/wood-color on railings. An association's governing documents cannot address every conceivable architectural issue. An association must be free to fill in the gaps, so long as it acts reasonably in doing so. See *Kirkley v. Seipelt*, 128 A.2d 430

⁴ It is no surprise that Montgomery County requires elevated decks to have railings. See Rspt. Ex. 7: "Decks 30 inches or less above grade are not required to have a guardrail."

(Md. 1957) (homeowner enjoined from installing heavy metal awnings, although restrictive covenants did not expressly address awnings).

The Panel also points out that the interference imposed on Mr. Syed's unrestricted use of his property in this case is slight. By mid-May of 2009 he was free to begin deck construction according to his plans and specifications with only one minor variation – the railings had to be of wood or a wood color instead of white. He was even free to use his preferred vinyl for the railings, so long as they were a wood color.

B. Abandonment; Arbitrary or Selective Enforcement

Complainant argued that, given the existence of four homes with white vinyl deck railings, the Association has abandoned any rule prohibiting white vinyl railings. Alternatively, enforcement of such a rule against him is selective and arbitrary. In support of his argument, Complainant stressed that, of those four homes, the Board expressly approved white vinyl railings as recently as March 2008, and the homeowner involved in that matter was sent an approval letter from the current property manager “affirm[ing the] harmony of external design and location in relation to surrounding structures and topography by the Board.” CX1 at 62. Moreover, the Board has not made any effort to limit perpetuation of these non-conforming features.

The Panel assumes that abandonment and arbitrary or selective enforcement would be good defenses to claims of architectural violations. *Lindner v. Woytowitz*, 378 A.2d 212, 216 (Md. App. 1977); *VanSickle v. M.O.M., Inc.*, 539 A.2d 1169, 1172 (Md. App. 1988). In this case, however, although it is a close question, the Panel concludes that the facts do not amount to abandonment or arbitrary or selective enforcement.⁵

Abandonment is a matter of intention. *Lindner v. Woytowitz*. The facts in this case show that the Association is intent, and largely successful, on preserving the rustic, woodsy appearance it desires. The photographs submitted by Respondent, although admittedly selective, do show trees, other plantings, and wood-surfaced fences and decks. Statistically, only a small percentage of homes – 4 out of 133, or 3% – have non-conforming railings. Considering only the 30 homes that have decks, the percentage rises to just over 13%.

Respondent's Board-member witnesses credibly explained how the four white vinyl railings came about – in three instances, by the independent action of a single Board member in disregard of the Association's governing documents, and in the fourth

⁵ Respondent cited provisions of its Declaration to the effect that no “rules, regulations, statements, standards, guidelines, criteria or the like shall be construed as a waiver of the provisions of this Article [dealing with architectural control].” CX1 at 90; Rpst. Ex. 10. The Panel is not persuaded that such stock language, standing alone, would trump a factually supported defense of abandonment or selective enforcement.

instance, through oversight by its former property manager. While Respondent offered no explanation for the “harmony of external design” language in the approval letter dated March 12, 2008, that language precisely tracks the architectural control provisions of the Association’s Declaration. See Decl. § 6.1, CX1 at 89. The Panel infers that the letter was simply a form response sent by the property manager.

As to the Association’s failure to date to limit perpetuation of the non-conforming railings, the Association’s witnesses testified that the Board is awaiting the Panel’s decision in this case. That is a business decision within the Association’s authority to make. *Black v. Fox Hills North Community Ass’n, Inc.*, 599 A.2d at 1231-32 (decision to allow a non-conforming fence was one the association was authorized to make and, absent fraud or bad faith, it was a business judgment with which a court will not interfere).

Complainant argued that various email exchanges supported his position on abandonment and selective enforcement. Some of those emails argue for approval of Mr. Syed’s application based on the possibility that a denial would be arbitrary. Other emails evince some confusion as to exactly what Mr. Syed was seeking to construct. Cmplt. Ex. 1. Notwithstanding these exchanges, however, the Board ultimately voted to deny white vinyl railings. The Panel concludes that the email exchanges reflect active (if at times mistaken) consideration of Mr. Syed’s application, including the very issues Mr. Syed raised before the Commission. In the Panel’s view, this supports, not undermines, the Board’s decision.

For the same reason that the Panel finds no abandonment, it concludes that the Association has not selectively enforced its architectural rules with respect to deck railings.

C. Privacy Screen

The Association’s architectural rules regulate privacy screens, but they do not specify any particular color or material. Instead, they require privacy screens to be “compatible with the architectural character of the house in terms of style, color, and materials” and “consistent with the visual scale of the houses to which they are attached.” CX1 at 17.

Mr. Syed argued that, since the trim on the rear of his home is white vinyl, a privacy screen of that same color and material would be compatible. This argument, at least in part, appears to assume that deck railings would be white vinyl as well.

The Board, on the other hand, interpreted its rules to require a neutral wood color. That interpretation is consistent with the overall appearance of the community and, in accordance with this decision, it would also be consistent with any deck and railings that Mr. Syed may construct.

The Panel concludes that the Board acted reasonably and its interpretation will be upheld.

IV. Order

Based on the foregoing findings and conclusions, it is by the Panel this 30th day of July, 2010, ORDERED that all relief requested in the Complaint is DENIED and the Complaint is DISMISSED WITH PREJUDICE.

Panel members Helen Whelan and Arthur Dubin concur in this Decision and Order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Charles H. Fleischer, Panel Chair